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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES T. OMAN, FRED R. WALKER, WILLIE A. GIBBONS, and HUGH V. REYNOLDS,
Petitioners,

v.

H.K. PORTER CO., RAYMARK INDUSTRIES, INC., and PITTSBURGH CORNING CORP.,
Respondents.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF

Asbestos Victims of America ("AVA"), by its attorneys, Gersten, Savage & Kaplowitz, respectfully moves this court for leave to file the accompanying brief in this case

as amicus curiae. The consent of the attorney for the petitioner herein has been obtained, but the attorneys for respondents herein have refused to consent to the filing of a brief by AVA as amicus curiae.

As the only organization of its kind representing the interests of tens of thousands of victims of asbestos-related diseases and their families, AVA has a unique interest in the questions presented by the instant case. The instant case involves the fundamental rights of thousands of asbestos victims who worked in this nation's shipyards to maintain a claim pursuant to the federal courts' admiralty jurisdiction. Moreover, the case presents important issues involving the retroactive application of new decisions of law to pending asbestos claims.

The brief of the petitioner herein adequately presents the legal and policy-

based arguments in favor of the grant of a writ of certiorari to and the ultimate reversal of the decision of the Fourth Circuit Court of Appeals. Nevertheless, AVA believes that the presence of the victims' voice herein in necessary to emphasize the national importance of the issues presented herein and the need for the Supreme Court to address these issues.

Upon the foregoing, it is respectfully requested that AVA's motion for leave to file the accompanying brief be granted.

Dated: New York, New York
October 3, 1985

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QUESTIONS PRESENTED

I. Whether admiralty jurisdiction applies to tort actions for injuries (1) received on board ships, (2) by shipbuilders and ship repair workers, (3) from defective asbestos insulation products that (4) were essential to the operation of the ships and (5) intentionally designed, marketed and advertised for shipboard use.

II. Whether a rule barring such a maritime cause of action can properly be applied retroactively by a court of appeals where shipyard asbestos victims detrimentally relied on the availability of maritime remedies due to the circuit's unambiguous prior precedent and where the tortious conduct of the manufacturer/

defendants occurred during a time when they could have had no expectation that shipboard injuries would be adjudicated under non-maritime law.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 764 F.2d 224 and reprinted as

Appendix A to the petition filed by petitioners herein.

JURISDICTION

The decision of the United States Court of Appeals was entered on June 6, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. III, §2: "The judicial power shall extend . . . to all Cases of admiralty and maritime jurisdiction."

STATEMENT

Asbestos Victims of America ("AVA") is a non-profit organization founded in 1981 by victims of asbestos-related diseases. Its membership consists of thousands of victims and their families, as well as union locals, professional persons, and interested individuals. It is supported entirely by membership dues, grants and donations. Its purposes are to aid the

individual and collective plight of asbestos victims throughout the United States, to increase public awareness of that plight, and to insure victim participation and representation wherever their interests are at stake.

In the past few years, AVA has become increasingly active in legal and governmental circles. Most notably, AVA's founder and executive director, James Vermeulen, himself a victim, was appointed by the United States Trustee for the Southern District of New York as a member of the Committee of Asbestos-Related Litigants and/or Creditors in the Manville Corporation Chapter 11 proceedings.

The filing of this brief represents the first time AVA has taken an official position in an ongoing litigation. AVA does not have the staff or monetary resources to intervene in every litigation

where a decision of law might have far-reaching effects upon the lives of its members. However, AVA considered the issues presented in this case sufficiently important, and the impact of the Fourth Circuit's decision herein sufficiently devastating to the interests of asbestos victims, that it warranted AVA's intervention herein as amicus curiae.

ARGUMENT

AVA believes that petitioners herein have more than adequately set forth the legal grounds for the grant of certiorari in this case. However, there are several points that need to be highlighted from the victims' vantage point.

Firstly, the Fourth Circuit's decision herein cannot be squared with the Supreme Court's decision in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972). Executive Jet set forth a two-

prong test for the application of admiralty jurisdiction to tort claims. To fall within such jurisdiction, a claim must have occurred in a maritime locality or situs, i.e., it must have occurred on navigable waters. Further, such a claim must bear a relationship to traditional maritime activity. A cursory but logical analysis would have to conclude that asbestos exposure during installation of insulation in ships located in navigable waters would satisfy this two-prong test. And a more detailed analysis invoking the Executive Jet rule, such as that conducted by the Fourth Circuit in White v. Johns-Manville Corp., 662 F.2d 234 (1981), could and did reach the same conclusion.

Yet in the instant case, the Fourth Circuit, by adopting a revisionist approach and crafting from the two-prong Executive Jet test a new four-prong nexus test,

rejected its 1981 decision in White, supra, and found that the installation of asbestos-containing insulation on ships is not "sufficiently related to maritime activity" to justify application of admiralty jurisdiction. Indeed, the Fourth Circuit strains credulity when it confesses that it "overlooked" a portion of the Supreme Court's Executive Jet decision in formulating its decision in White.

The petitioners' petition illustrates the strained logic and unfairness of the Fourth Circuit's decision herein. Yet putting to one side for the moment superimposed "nexus" tests which are often fashioned to justify the results of their application, it is valuable to observe these questions from the perspective of an individual who installed insulation in ships. There can be no question that without insulation such ships and their human and

material cargo might not have reached their destinations. It is also indisputable that workers installing such insulation did so aboard ships and were subject to the same cramped and dangerous conditions as sailors. Yet they are denied the availability of admiralty jurisdiction because their "activities were not the types of activities traditionally done by sailors," 764 F.2d at 229, notwithstanding that their activities clearly involved and impacted upon maritime commerce. Those trained in the law may label this the exaltation of form over substance, but to asbestos victims it is merely another means of depriving access to an avenue of justice which by any reasonable assessment should

remain open to them.[1]

Secondly, and perhaps most devastating to the interests of AVA's members, is the portion of the Fourth Circuit's decision in the instant case which applied the newly-adopted approach retroactively. Petitioners' brief adequately discusses the

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[1] It should not go unnoted that, as pointed out in Petitioners' Petition at 13,

> the Fourth Circuit has more recently held that admiralty does cover a lawsuit by a water skier against the towboat operators on the apparent theory that water-skiing consitutes navigation. Hogan v. Overman, No. 84-2119 (July 18, 1985).

It might also be asked whether water skiing would be considered by the Fourth Circuit to be among "the types of activities traditionally done by sailors."

proper standard for nonretroactive application of decisions as set forth in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), as well as the proper application of such standard to the case at bar. That analysis need not be repeated here. However, the inequity and negative impact that retroactive application of the Fourth Circuit's decision will have on many asbestos victims cannot be sufficiently emphasized.

AVA does not know the number of asbestos victims and families with pending cases whose rights may be undermined by retroactive application of the Fourth Circuit's decision herein. The danger may now be limited to claimants with claims pending in the State of Virginia, although the precedent set by the decision, if permitted to go unchecked, could affect claimants in other states. This is

especially a problem in the few other states with anachronistic statute of limitations rules which trigger the running of the statute on the date of first exposure to asbestos, notwithstanding the fact that asbestos disease may not be discovered until twenty or more years after initial exposure. Moreover, it is apparent that those plaintiffs in Virginia who relied on the applicability of admiralty jurisdiction will suffer irreparable harm from the retroactive application of the Fourth Circuit's decision.

Assuming arguendo the Fourth Circuit's substantive decision herein is a correct application of the Executive Jet test, there is still no requirement that claimants be punished for their reliance on the Fourth Circuit's previous and unambiguous decision in White, supra. The Fourth Circuit's inflexible approach to the substantive

issues herein need not be the approach to the issue of retroactivity. Petitioners' petition herein noted the "insensitivity" of the Fourth Circuit in determining that the "respondents should not be denied the fruits of their labor in finally convincing a majority of this Court of the merit of their position." 764 F.2d at 232. It should be recalled that the respondents herein are asbestos manufacturers or distributors, some of whom have been found by juries and courts throughout the United States to have knowingly concealed the dangers of asbestos exposure to protect their profits. The Fourth Circuit's determination that they should "not be denied the fruits of their labors," while shipyard workers with diseased lungs have their claims reclassified out of existence, is difficult to fathom. Surely in the balancing of the equities the unwitting

victims deserve at lease equal treatment. Many of them have already been deprived of the fruits of their many years of hard labor. It is respectfully submitted that it is inequitable to penalize these individuals for having placed reliance on an unambiguous decision of the Fourth Circuit.

Finally, a writ of certiorari should be granted herein because this case satisfies at least one major factor for determining whether certiorari should be granted, to wit, it presents important issues of law, of first impression for the Supreme Court, that directly impact on the lives of thousands of asbestos victims nationwide. The national importance of an issue has been held in numerous cases to be a ground for granting a writ of certiorari. See, e.g., Davis v. Scherer, __ U.S. ___, 104 S. Ct. 312, rehearing denied __ U.S. ___, 105 S.

Ct. 26 (1984) (1984) and Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 734 (1968).

Petitioners' petition demonstrates, and this brief reemphasizes, the importance of the questions presented herein. The Fourth Circuit's decision blocks access by a significant portion of tens of thousands of present and future asbestos victims to a powerful federal remedy. Secondly, as previously stated herein, the retroactive application of the Fourth Circuit's decision may rob a number of victims, whose claims were partially settled with codefendants, of any possiblity of further recovery, even though the sums for which such plaintiffs settled may have been inadequate and may have been agreed upon on the premise that a valid action remained as to other codefendants.

CONCLUSION

For all the reasons stated hereinabove and in Petitioners' Petition for a Writ of Certiorari herein, Asbestos Victims of America respectfully supports Petitioners' Petition for the grant of a Writ of Certiorari in this case to the United States Court of Appeals for the Fourth Circuit, and respectfully urges consideration of the important issues presented herein by the Supreme Court of the United States.

Respectfully submitted,

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